IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2480 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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OIL & NATURAL GAS CORP. - Appellant(s)

Versus

RAJKAMAL BUILDERS & 3 - Defendant(s)

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Appearance :
M/S TRIVEDI & GUPTA for Appellant(s) : 1,
MR KG SUKHWANI for Defendant(s) : 1,
NOTICE SERVED for Defendant(s) : 2 - 4.
MR MAULIN R RAVAL for Defendant(s) : 2,
MR BN PATEL for Defendant(s) : 4,
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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 27/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Rule. With consent of the parties, the matter is finally heard.

The present is an appeal under Section 37 of Arbitration and Conciliation Act, 1996 (“the Act” for short) against the judgement dated 15.9.2003 by the learned Judge No. 15, City Civil Court, Ahmedabad, in Civil Miscellaneous Application No. 300 of 2000.

Though the learned subordinate Judge opened the judgement saying that he was dealing with application under Section 33 of the Act but in fact the application before him was filed under Section 34 of the Act.

The short facts necessary for disposal of the present appeal are that the Sabarmati Over bridge Project was decided to be constructed by Ahmedabad Municipal Corporation (“AMC” for short) as per the resolutions dated 16.4.1991 and 18.3.1994 passed by the Government. Initially, the estimated cost was Rs. 11 crores. It was decided that AMC, AEC (Ahmedabad Electricity Company), ONGC (Oil and Natural Gas Corporation) and GSRTC (Gujarat State Road Transport Corporation) shall contribute to the extent of Rs. 4 crores, Rs. 1 crore, Rs. 2 crores, and

Rs. 4 crores respectively. It was also decided that in the event of cost going beyond Rs. 11 crores, additional cost upto Rs. 1 crore would be borne by ONGC and AEC in the proportion of 2:1. It is not in dispute that AMC appointed AEC as an agent and Manager of AMC for construction of railway over bridge but after completion of the project, the cost came to Rs. 11,38,06,000.00 and as per the Government resolution, additional cost of Rs. 38,06,000.00 was contributed by ONGC and AEC in the proportion of 2:1. The contractor, namely, M/s. Rajkamal Builders made a further demand of Rs. 1,33,36,200.00 from the AMC on various grounds. Denial on the part of the AMC gave cause of action to the contractor to make application to the High Court for appointment of an Arbitrator under Section 11 of the Act. By order dated 9.10.1998 in Arbitration Petition No. 5 of 1998, Mr. Justice P.M. Chauhan (Retd.) was appointed as sole Arbitrator in the matter. After completion of the proceedings, the sole Arbitrator in Arbitration Case No. 3 of 1998 made an award on 15.6.1999 and held that the AEC and AMC are jointly and severally liable to pay Rs. 20,14,860.00 with interest at the rate of 12 per cent from the date of the award to the original claimant or the contractor. The AEC, after pronouncement of the

order, made an application under Section 33 of the Act to the Arbitrator (Request Application No. 1 of 1999) for correction of the award but the same came to be rejected by arbitration order dated 27.9.1999. The award was, thereafter, challenged by the AEC in the High Court by a petition bearing No. 56 of 1999 on 3.11.1999. Though a notice was issued by the High Court but the petition was ultimately rejected. It appears that the High Court returned the application to AEC for its proper presentation before the appropriate Civil Court under Section 34 of the Act.

It is to be noted that the Arbitrator in its award dated 15.6.1999 clearly held that ONGC and GSRTC were not answerable to the claim made by the contractor and the application of the contractor against ONGC and GSRTC was dismissed.

After hearing the parties, the learned Court below allowed the objections submitted under Section 34 of the Act and held that AMC stands exonerated from the liability to suffer the award. It however observed that the original applicant AEC and ONGC shall respectively pay Rs. 6,71,620/- and Rs. 13,43,240/- to the original

claimants M/s. Rajkamal Builders along with 12 per cent interest on the said amount from the date of award till realisation. The order passed by the learned Court below has not been challenged by AEC and they appear to be content with the direction. ONGC being aggrieved by the liability fixed against them is before this Court under Section 37 of the Act.

Mr. Thakar, learned advocate for the appellant, submits that the jurisdiction of the Court under Section 34 of the Act is not to shift the liability from one party to another. His submission is that while the Court is considering objection under Section 34 of the Act it only has to look into the legality of the award and its maintainability but no court would have jurisdiction to shift the liability of one party to another and make an independent award contrary to the award made by the Arbitrator.

The further submission is that from the very language of Section 34 of the Act it would clearly appear that the Court below had no jurisdiction to hold the present appellant liable to any extent. The learned counsel for AEC submits that he is not interested in that

part of the dispute but the said respondent would be happy with the liability fixed by the lower Court. The learned counsel for M/s. Rajkamal Builders submits that the learned Court below had no jurisdiction to shift the liability, therefore, the order deserves to be set aside in toto. He also submits that if the appeal filed by ONGC is to be allowed then the award as delivered by the Arbitrator should be restored. Taking an exception to this argument, the learned counsel for AEC and AMC submit that unless the order is challenged by the builder, namely, M/s. Rajkamal Builders, the whole order cannot be set aside but this Court would have jurisdiction to consider the appeal filed by ONGC and to the extent of their liability as decided by the Court below. It is also submitted by AMC and AEC that if AEC is held liable to the extent of Rs. 6,71,620/- only then this Court in appeal filed by ONGC cannot hold them liable for 100 per cent and if the Corporation has been exonerated in toto then in appeal by ONGC no benefit can be granted in favour of M/s. Rajkamal Builders.

That Act provides that in case of dispute the matter will have to be referred to the Arbitrator and the Arbitrator would have jurisdiction. Once an award is made

by the Arbitrator then the award would be binding upon the parties unless the award is modified by the Arbitrator himself under Section 33 of the Act or is considered by Court under Section 34 of the Act.

The title of Section 34 says “application for setting aside arbitral award”. Recourse to Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). If the Court has jurisdiction to set aside the award then it must set aside the award and in case it finds that it can grant some other relief to the claimant before it or to the claimant before the Arbitrator then it can award such relief. In any case when a party challenges its liability as fixed by the Arbitrator then Court would have no jurisdiction to shift the liability of one party on the head of another. In a case falling under Section 34 of the Act the Court would have jurisdiction to decide about legality and validity of the award but would have no jurisdiction to say that the Arbitrator was wrong in finding one particular person wrong. If a person is aggrieved by the liability fixed by the Arbitrator then he has to file an application under Section 34 of the Act and if the claimant is aggrieved by

exoneration of some other party then he is required to file an application under Section 34 seeking further and better relief or for setting aside of the award with a direction for remittance of the matter to the Arbitrator. In any case in an application filed under Section 34 by one of the persons aggrieved by the award, the Court would not exercise the jurisdiction in fixing the liability on the head of another.

We are not required to enter into this question any further in view of the submission made by Mr. Sukhwani, learned counsel, that the liability could not be shifted on the head of the present appellant. The said part of the order holding the present appellant liable to the extent of Rs. 13,43,240/- is set aside.

Mr. Sukhwani, learned counsel at this stage submits that if the Court is setting aside the order passed by the Court below then the whole award must be restored back. Serious exception is taken to this submission by the learned counsel for AEC and AMC, it is jointly submitted that the order passed in favour of AEC and AMC cannot be set aside in appeal filed by ONGC, especially when the builder namely M/s. Rajkamal Builders has not

challenged the order passed by the Court below.

It is to be seen that the present appeal has been filed under Section 37 of the Act and not under Section 96 of the Civil Procedure Code. Had it been an appeal under Section 96 of the Civil Procedure Code, the provisions contained under Order 41 Rule 33 could be applied but the present being appeal under Section 37 of the Act, provisions contained in Order 41 Rule 33 of the Civil Procedure Code cannot be applied. If the original claimant M/s. Rajkamal Builders is aggrieved by the order passed by the Court below then it is obliged to challenge the said order before appropriate forum in appropriate proceedings in accordance with law. We say no more on that subject. The order passed by the Court below holding the appellant liable to M/s. Rajkamal Builders to the tune of Rs. 13,43,240/- is set aside.

The appeal is allowed. There shall be no order as to costs.

(R.S. GARG, J)

(K.M. MEHTA, J)

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